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WHAT EPA SAYS, GOES: DISPUTE RESOLUTION UNDER THE RCRA CORRECTIVE ACTION PROGRAM AND THE IMPACT OF THE PROPOSED RULE

Steven L. Leifer*

INTRODUCTION

Responding to releases of hazardous waste or hazardous constituents from solid waste management units (SWMUs) is becoming a priority for both government and private industry. The Environmental Protection Agency (EPA or the Agency) has estimated in the proposed corrective action rule published in July 1990¹ that more than 5,700 facilities, containing approximately 80,000 SWMUs,² are potentially subject to the corrective action requirements of sections 3004(u) or 3008(h) of the Resource Conservation and Recovery Act (RCRA).³ The cost of implementing cleanup at RCRA facilities may well exceed \$40 billion.

The enormous scope of the corrective action program, as well as the "Superfund-like" complexity of each individual cleanup, places a premium on the dispute resolution process. Inevitably, there will be disputes between the facility owner/operators and the government. Problems will arise as to the proper methodology for studying these sites and fashioning adequate remedies. The result of these disputes may have significant cost consequences. As discussed below, while the current system of resolving disputes is quite unfavorable to private industry, the proposed rule merely exacerbates the problem.

I. THE DISPUTE RESOLUTION PROCESS UNDER RCRA

A. *Permitted Facilities*

Performing corrective action in conjunction with or following the issuance of a permit granted by EPA necessitates a modification of the terms of the permit. Currently, sections 270.41 and 270.42 in Title 40 of the C.F.R. provide the framework for incorporating modifications initiated by EPA and private parties, respectively. Section 270.41 refers to Title 40, Part 124 of the C.F.R. for the procedures governing permit modifications, including provisions for compiling an administrative record, holding public hearings, and appealing permit modification decisions to the Administrator. Section 270.42 breaks down private party requests for

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1. See Preamble of the proposed RCRA Corrective Action Rule, 55 Fed. Reg. 30,861 (1990) (to be codified at 40 C.F.R. pts. 264, 265, 270, 271) (proposed July 27, 1990).

2. *Id.*

3. 42 U.S.C. §§ 6924(u), 6928(h) (1990).

modification into three classes.⁴ Class I modifications are minor changes that can be accomplished almost unilaterally. Class II modifications are more significant and generally require that a comment period be established and a public hearing held. Class III modifications substantially affect the operation of the facility and demand that the hearing procedures in Part 124 be followed.⁵

While EPA maintains that the existing permit modification procedures adequately allow the Agency to modify a permit to incorporate corrective action measures, it nevertheless proposed a new section to clarify the matter.⁶

In its new proposal, EPA has chosen to establish a separate section (40 C.F.R. section 270.34) to address modifications relating to response activities.⁷ This section allows EPA to establish a schedule for corrective action simply by publishing a notice of the proposed corrective measures, asking for written comment, and rendering a final decision.⁸ No public hearing is required. EPA, however, may choose to use the permit modification procedure of section 270.41, which does include a public hearing, if it feels that the complexity or significance of the modification so warrants.⁹ There is no administrative right of appeal from EPA decisions made under section 270.34. The section 270.34 process can be used for any modification determination except for the decision as to what remedy should be implemented to clean up a RCRA site. This decision can only be made by following the section 270.41 procedures.¹⁰

In addition to its function as a method of incorporating changes, EPA is also using section 270.34 as a dispute resolution mechanism. The Supplemental Information accompanying the proposed section states in relevant part that:

"[T]he Agency believes that the proposed § 270.34(c) modification procedure will be used in the case of disputes which may arise between the permittee and the Agency. In practice, the Agency presumes that the permittee and the Director will be able to resolve most issues that arise during the course of corrective action without resorting to the procedures of section 270.34(c). For example, disputes may arise over the scope of a remedial investigation and how many monitoring wells may need to be installed, or the appropriate soil sampling procedure.

4. Where a requested modification, such as almost all of those involving corrective action, is not assigned a classification in the appendix to § 270.42, the modification is presumed to be Class III, unless the Agency approves a request to assign a different classification.

5. See 40 C.F.R. § 270.42(a)-(c) (1990).

6. See 55 Fed. Reg. 30,884 (1990) (to be codified at 40 C.F.R. § 270.41(a)(5)(ix)); see Preamble at 55 Fed. Reg. 30,850 (1990). Interestingly, there are no sections 270.41(a)(5)(i)-(viii). EPA intended to number the new section 270.41(a)(6). This error will be corrected when the rule is published in final form.

7. See 55 Fed. Reg. 30,884 (1990) (to be codified at 40 C.F.R. § 270.34).

8. *Id.*

9. See Preamble at 55 Fed. Reg. 30,848 (1990).

10. See 55 Fed. Reg. 30,879 (1990) (to be codified at 40 C.F.R. § 264.526(a)).

The permit modification proposed in section 270.34(c) might be used in this case"¹¹

B. *Interim Status Facilities*

For interim status facilities which are not seeking a final Part B permit, the modification process set forth in sections 270.34, 270.41, and 270.42 is not applicable. EPA imposes corrective action requirements through a unilateral or, more often, a "negotiated" administrative order under RCRA section 3008(h).¹²

EPA's position, as expressed in its RCRA section 3008(h) Model Consent Order,¹³ is that parties be given the opportunity to express their disagreement with an EPA decision in writing, and that the Agency will then render a decision within ten days. The Model Order also provides that EPA's resolution of a dispute shall not constitute final agency action giving rise to the right of appeal to the courts.¹⁴ So far, EPA has managed to convince recipients to agree to such a basic dispute resolution mechanism.¹⁵

II. ISSUES ARISING FROM THE CURRENT DISPUTE RESOLUTION SYSTEM

A distinction should be made between disagreements over the type of remedy to be implemented at a site and all other disagreements concerning corrective action. Presently, remedy selection is handled through the permit modification process which provides for a comment period, a public hearing, a right of appeal to the Administrator, and a right of appeal

11. 55 Fed. Reg. 30,848-49 (1990).

12. See 42 U.S.C. § 6928(h) (1990). The section states:

(1) Whenever on the basis of any information the Administrator determines that there is or has been a release of hazardous waste into the environment from a facility authorized to operate. . . ., the Administrator may issue an order requiring corrective action or such other response measure as he deems necessary to protect human health or the environment or the Administrator may commence a civil action in the United States district court in the district in which the facility is located for appropriate relief, including a temporary or permanent injunction.

(2) Any order issued under this subsection may include a suspension or revocation of authorization to operate. . . ., shall state with reasonable specificity the nature of the required corrective action or other response measure, and shall specify a time for compliance. If any any person named in the order fails to comply with the order, . . . such person shall be liable to the United States for, a civil penalty in an amount not to exceed \$25,000 for each day of noncompliance with the order.

Dispute resolution is thus handled through negotiation.

13. See Interim Final RCRA Section 3008(h) Model Consent Order, OSWER Directive 9902.5 (Jan. 19, 1988).

14. See *id.* at para. XV.

15. See, e.g., *In re Mobay Corp.*, EPA Docket No. RCRA-III-016-CA ¶ 15 (Feb. 6, 1989); *In re Rollins Envtl. Services, Inc.*, EPA Docket No. VI-004(h)-88-H ¶ 5.S (May 1, 1989).

of the final Agency decision to the judiciary.¹⁶ Though cumbersome, this procedure is reasonable in light of the importance of the remedy selection determination.

However, the current system for handling disputes over non-remedy selection issues is both unwieldy and one-sided in favor of the government. The proposed section 270.34 procedure unfortunately does nothing to add balance to the dispute resolution process. Furthermore, companies are faced with a rather disconcerting number of open questions. If, for example, a company submits a RCRA Facility Investigation (RFI) to EPA and the Agency rejects it as inadequate and asks for a substantial amount of additional information, the company could try to oppose this and argue that the RFI fully complied with all terms of its permit. Does EPA have the right to initiate a permit modification to achieve its objectives? If so, should it use section 270.41 or section 270.34? Could the company "beat the Agency to the punch" by invoking the permittee-initiated modification procedure of section 270.42? Should the company instead lobby for use of section 270.34? Does the section 270.34 procedure provide a legitimate opportunity to contest a disputed issue?

It should be emphasized that EPA has almost absolute authority, absent a negotiated dispute resolution process, to choose whatever mechanism it wishes to apply to the disagreement. If the Agency believes that the company's position in a dispute is unreasonable and not in accordance with the permit's corrective action schedule, it may issue an order under RCRA section 3008 to compel compliance.¹⁷ Alternatively, it has sole discretion over whether to choose the section 270.41 or the section 270.34 procedure.¹⁸ (In theory, a company could submit a modification request by invoking section 270.42. However, the Agency could ignore the request and instead proceed with its own initiatives).

The Agency will almost always choose the section 270.34 process, since it is more streamlined and does not provide for an administrative appeal. Indeed, in some cases a company may view the section 270.34 process as the lesser of two evils. The company may not be interested in an administrative appeal and may favor a dispute resolution process which provides the fastest route to the judiciary and its neutral arbiters since under section 270.34, Agency decisions are directly appealable to the courts.¹⁹ Another advantage in selecting section 270.34 is that public hearings, with their attendant publicity, are not required. EPA, however, reserves the right to hold hearings if it so desires.

16. See 40 C.F.R. § 270.41 (1990).

17. See 55 Fed. Reg. 30,850 (1990).

18. *Id.* at 30,848 (1990).

19. Administrative Procedure Act, 5 U.S.C. § 704 (1988). Based on the language in the preamble, EPA seems to agree with this position. "If an owner/operator's appeal is denied, s/he then has some recourse through judicial appeal proceedings." 55 Fed. Reg. 30,848 (1990).

III. RECOMMENDED ACTION

Appealing Agency determinations to the Administrator or to the courts is an expensive and time-consuming proposition. While the section 270.34 mechanism seems preferable to the formal proceedings under sections 270.41 or 270.42, particularly since one would not be required to further exhaust administrative remedies prior to seeking relief in federal court, the best course of action may be to build a more favorable dispute resolution process directly into the permit or order.

In the draconian world of RCRA section 3008(h)²⁰ corrective action orders, it is imperative that companies look for alternatives to "what EPA says, goes." Companies should recognize that options exist for obtaining at least some review of EPA's initial determination. The companies could, for example, propose embodying the dispute settlement in a judicially approved consent decree rather than in an administrative order, providing ready access to a judge.²¹ The decree could even allow for certain types of disputes to be subject to administrative hearing procedures such as those set forth in 40 C.F.R. Part 24.²² Another alternative would be to establish a two-stage dispute resolution process, where an initial decision of an EPA official could be brought before a higher Agency manager.²³ Finally, companies could incorporate alternative dispute resolution (ADR) provisions into their corrective action agreement. For example, some consent orders call for the use of a third-party "neutral"²⁴ or a mediator²⁵ to aid in resolving disputes if informal negotiations fail.

The concept of using ADR techniques also has application in the permit modification setting. Indeed, in the proposed corrective action rule, EPA states that it "intends to encourage, when appropriate, the use of ADR in certain situations as the RCRA corrective action program evolves."²⁶

As an alternative to the somewhat one-sided section 270.34 procedure, permitted facilities involved in a dispute should consider incorporating ADR mechanisms such as arbitration, mediation, or fact-finding into their schedules of compliance. Moreover, the industry may wish to submit formal comments on the usefulness of ADR techniques in resolving

20. 42 U.S.C. § 6928(h) (1990).

21. See *United States v. Hudson Refining Co.*, Civ. Action No. 84-2027-A (May 1, 1986).

22. See *In re Pennwalt Corp.*, EPA Docket No. V-W-89-R-45 (Sept. 21, 1989).

23. See *In re Texaco Refining & Mktg., Inc.*, EPA Docket No. RCRA 3008(h)-VIII-88-11 (Apr. 12, 1989). Another idea along these same lines is to establish an EPA panel of technical experts dedicated to resolving corrective action disputes.

24. See *In re Safety-Kleen Corp.*, EPA Docket No. VW-88-C-130 ¶ 22, (March 16, 1989).

25. See *In re Owens-Corning Fiberglass Corp.*, EPA Docket No. 89-34-R, ¶ 15 (Sept. 29, 1989).

26. 55 Fed. Reg. 30,851 (1990). See also EPA's "Final Guidance on Use of Alternative Dispute Resolution (ADR) Techniques in Enforcement Actions," August 14, 1987.

disputes over corrective action to the Agency with an eye towards influencing the final rule. EPA has set forth in the proposed rule a series of issues on which it would like to receive comments.²⁷

The industry's awareness of the available options will prevent companies from becoming trapped by the unilateral dispute resolution process presently being contemplated by EPA.

27. See 55 Fed. Reg. 30,851 (1990). Of particular significance to industry are the issues of which ADR techniques are appropriate and who should bear the cost.